

STATE OF MICHIGAN
COURT OF APPEALS

AMIR AL-NAIMI and SANDRA AL-NAIMI,

Plaintiffs/Counter-Defendants-
Appellees,

v

FOODLAND DISTRIBUTORS, INC.,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellant,

and

NABBY YONO, FARIS NAIMI, ALAA NAIMI,
ADNAN NAIMI, NADIA, INC., and AL-NAIMI
ENTERPRISES,

Third-Part Defendants-Appellees,

and

RICHARD OTTO,

Third-Party Defendant.

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that summary disposition was appropriate in this case.

"Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003), reh den 469 Mich 1224 (2003). Here, the trial court's opinion concedes an issue of fact related to at least one of the mortgages:

Other than the credibility argument, the only evidence that could potentially create a factual dispute regarding the legitimacy of the mortgages is the fact that Adnan Al-Naimi sued his brother Amir Al-Naimi in 2003 for money damages regarding rental property. This litigation is inconsistent with Adnan Al-Naimi's claim that he holds a legitimate mortgage on Plaintiffs' home or that Plaintiffs owe him \$200,000. Although this evidence arguably give rise [to] issues of fact regarding Foodland's fraudulent conveyance claim as the mortgage grated to Adnan Al-Naimi, Foodland provide[s] no evidence demonstrating a factual dispute regarding the legimacy [sic] of any other the other loans

Foodland's failure to provide evidence related to the other loans cannot support a grant of summary disposition as to a claim against a mortgage where such a factual dispute clearly exists.

Additionally, I disagree with the trial court's conclusion that there is no factual dispute as to the other loans. To the contrary, I conclude that there is a question of fact whether the challenged mortgages were entered into by plaintiff for purposes of avoiding collection on the judgment. First, the relevant mortgages are all to family members and friends rather than to a financial institution. Second, plaintiff has not made any installment payments on any of these mortgages, raising the question whether they are real loans at all, or simply paper loans to create encumbrances. Third, the documentation of these transactions all took place during the original lawsuit between the parties that gave rise to the judgment. These are all "badges of fraud" as set forth in MCL 566.34 and *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 659-660; 513 NW2d 441 (1994). This evidence is sufficient to create a question of fact as to whether these were fraudulent transactions. In addition, evaluation of the witnesses through trial testimony is the best way for the trier of fact to determine credibility. Thus, I conclude that the trial court erred in granting summary disposition.

Finally, I note the majority's assertion that summary disposition is appropriate because "Foodland has not shown that the property has any value in excess of those mortgages such that there would be anything left with which to satisfy its judgment liens even if it were to prevail on its claim to set aside the mortgages issued to Adnan Naimi" is irrelevant. Whether Foodland is ultimately able to collect its judgment remains to be seen. The only question before us is where they stand in relation to other alleged creditors.

Accordingly, I would reverse and remand for trial.

/s/ Douglas B. Shapiro